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Mah Sing Properties Sdn Bhd v Sinar TM Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-11BNCVC-14–10 OF 2017
SEE MEE CHUN J
9 JANUARY 2019

C

Land Law — Vacant possession — Late delivery of vacant possession — Claim for liquidated and ascertained damages — Sessions court allowed respondent's claim — Appellant appealed against sessions court's decision — Whether late delivery of vacant possession subjected to excuse — Whether appellant allowed to claim for non-payment of monies by respondent

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The respondent had filed a claim for liquidated and ascertained damages against the appellant, a housing developer, for the late delivery of vacant possession of a semi detached factory (type A) at Lot No SDL63 Mukim Tanjung Kupang, Johor Bahru ('the unit'). The claim was allowed by the sessions court. The appellant then appealed against the decision of the sessions court. The date of completion for the unit was on 25 September 2016 which was 36 months from the date of sale and purchase agreement. There was a vacant possession of the unit on 4 January 2017. The extension of time were given twice firstly from July–November 2016 ('EOT No 1') and secondly from December 2016–March 2017 ('EOT No 2'). There was a delay in the delivery of vacant possession. The thrust of the defence was that the extension of time had been granted due to Tenaga Nasional Bhd ('TNB') not being able to complete the electrical infrastructure work as a result of a nationwide shortage of material. The issue was whether cl 20 of the sale and purchase agreement dated 26 September 2013 applied such that the delay could be excused and therefore no claim for liquidated and ascertained damages. The extension of time was granted due to delay by Tenaga Nasional Bhd in the completion of the electrical infrastructure work mainly due to the administrative procedures and nationwide shortage of materials which was beyond the appellant's control. Mr Tong Tee Wee ('DW2') and En Norazman Ahmad ('DW3') the consulting engineer appointed by the appellant confirmed in the materials which suffered a shortage were important materials essential to complete the project and these were transformer, switch gear and cables. That cause of delay was also confirmed by the TNB area manager, En Mohamad Salikon ('DW4'). The appellant had also raised the defence that there could be no vacant possession where the respondent had not paid all installments of the purchase price and any other monies payable under the sale and purchase agreement.

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Held, allowing the appellant's appeal:

(1) The totality of the evidence of DW2, DW3 and DW4 was that there was a nationwide shortage of materials such as transformer, switch gear and cables; these materials were important for the project; the shortage had delayed the electrical infrastructure work done by TNB; and that it was beyond the control of the defendant. This was a force majeure event within cl 20, such that the EOT Nos 1 and 2 allowed pursuant to cl 15.1 was final and binding upon the parties as stipulated in cl 20.2. By virtue of the extension of time which was final and binding, the defendant was not liable for the liquidated and ascertained damages (see paras 18–19 & 21).

(2) Pursuant to cl 14.1 of the sale and purchase agreement, the respondent was required to pay to the appellant all outgoings including the quit rent and assessment commencing from the date of sale and purchase until a separate document of title was issued and the service fee and maintenance charges. Thus the amounts for assessment, quit rent, service fee and maintenance were due and payable to the appellant as reflected in the invoices. The same too for Form I and the deposit for water meter. The renovation fee was also payable being a requirement imposed by the appellant. On RM4,725.05 being the late payment interest, there was no invoice issued. In any event, the appellant had proved there were other monies payable which the respondent had not paid, even without taking into account the late payment interest. Therefore, pursuant to cl 15.1 of the sale and purchase agreement, there could be no vacant possession (see paras 32–33).

[Bahasa Malaysia summary

Responden telah memfailkan tuntutan untuk ganti rugi jumlah tertentu dan ditentukan terhadap perayu, pemaju perumahan, untuk serahan lewat milikan kosong kilang separa berkembar (jenis A) di Lot No SDL63 Mukim Tanjung Kupang, Johor Bahru ('unit tersebut'). Tuntutan itu dibenarkan oleh mahkamah sesyen. Perayu kemudian telah merayu terhadap keputusan mahkamah sesyen. Tarikh siap untuk unit tersebut adalah pada 25 September 2016 iaitu 36 bulan dari tarikh perjanjian jual beli. Terdapat milikan kosong unit tersebut pada 4 Januari 2017. Lanjutan masa telah diberikan dua kali pertama dari Julai–November 2016 ('EOT No 1') dan kedua dari Disember 2016–Mac 2017 ('EOT No 2'). Terdapat kelewatan dalam serahan milikan kosong itu. Inti pati pembelaan adalah bahawa lanjutan masa telahpun diberikan kerana kelewatan Tenaga Nasional Bhd menyiapkan kerja infrastruktur elektrik terutamanya akibat prosedur pentadbiran dan kekurangan bahan seluruh negara yang tidak dapat dikawal oleh perayu. Encik Tiong Tee Wee ('DW2') dan En Norazman Ahmad ('DW3') jurutera perunding yang dilantik oleh perayu mengesahkan kekurangan bahan tersebut adalah bahan utama yang penting untuk menyiapkan projek tersebut dan ianya adalah transformer, suis gear dan kabel. Sebab kelewatan tersebut juga

disahkan oleh pengurus kawasan TNB, En Mohamad Salikon ('DW4'). Perayu juga menimbulkan pembelaan bahawa tiada milikan kosong jika responden tidak membayar semua ansuran harga belian dan apa-apa wang lain di bawah perjanjian jual beli itu.

Diputuskan, membenarkan rayuan perayu:

(1) Keseluruhan keterangan DW2, DW3, dan DW4 adalah bahawa terdapat kekurangan bahan seperti transformer, suis gear dan kabel; bahan-bahan tersebut penting untuk projek itu; kekurangan tersebut telah melengahkan kerja infrastruktur elektrik dijalankan oleh TNB; dan ia adalah di luar kawalan defendan. Ini adalah kejadian force majeure dalam skop fasal 20, iaitu agar EOT No 1 dan No 2 dibenarkan menurut fasal 15.1 adalah muktamad dan mengikat pihak-pihak sebagaimana dinyatakan dalam fasal 20.2. Menurut lanjutan masa yang muktamad dan mengikat, defendan tidak bertanggungjawab untuk ganti rugi tertentu dan ditentukan itu (lihat perenggan 18–19 & 21).

(2) Menurut fasal 14.1 perjanjian jual beli, responden dikehendaki membayar kepada perayu semua wang keluar termasuk cukai tanah dan taksiran bermula dari tarikh jual beli sehingga satu dokumen hak milik berasingan dikeluarkan dan yuran perkhidmatan dan caj penyelenggaraan. Oleh itu jumlah taksiran, cukai tanah dan penyelenggaraan terhutang dan kena dibayar kepada perayu sebagaimana dinyatakan dalam invois-invois itu. Yang sama juga untuk Borang I dan deposit untuk meter air. Yuran pengubahsuaian juga kena dibayar kerana keperluan yang dikenakan oleh perayu. Berhubung faedah bayaran lewat berjumlah RM4,725.05, tiada invois dikeluarkan. Dalam apa keadaan, perayu telah membuktikan terdapat wang lain yang kena dibayar yang mana tidak dibayar oleh responden, meskipun dengan mengambil kira faedah bayaran lewat. Oleh demikian, menurut fasal 15.1 perjanjian jual beli, tiada milikan kosong (lihat perenggan 32–33).]

Notes

For cases on vacant possession in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5969–5975.

Cases referred to

Araprop Development Sdn Bhd v Leong Chee Kong & Anor [2008] 1 MLJ 783, CA (distd)

Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo [2014] 1 MLJ 718; [2013] 3 CLJ 663, CA (refd)

Tang Kam Thai & Ors v Langkah Cergas Sdn Bhd & Ors [2005] 7 MLJ 605, HC (distd)

Muhammad Adam Abdullah (Nur Syamini Amalina with him) (Law Office of

A *Adam Abdullah & Mani) for the appellant.*
Abd Rahim bin Ali (Rahim, Aidil & Partners) for the respondent.

See Mee Chun J:

B INTRODUCTION

[1] The plaintiff had filed a claim for liquidated and ascertained damages ('LAD') against the defendant, a housing developer, for the late delivery of vacant possession of a semi detached factory (type A) at Lot No SDL63 Mukim C Tanjung Kupang, Johor Bahru ('the unit'). The claim was allowed by the magistrate's court. The defendant's appeal was allowed by the High Court. This is the appeal by the plaintiff against the decision of the High Court.

UNDISPUTED FACTS

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[2] The following facts were not disputed:

(a) date of completion — 25 September 2016 (36 months from date of sale and purchase agreement of 26 September 2013);

E (b) vacant possession — 4 January 2017 (*RR*/67–68);

(c) extension of time ('EOT') No 1 — July–November 2016 (*RR*/61–62); and

(d) EOT No 2 — December 2016–March 2017 (*RR*/64–65).

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ISSUE

[3] From the dates as given above, there was a delay in the delivery of vacant possession. The thrust of the defence was that the EOT Nos 1 and 2 had been G granted due to Tenaga Nasional Bhd ('TNB') not being able to complete the electrical infrastructure work as a result of a nationwide shortage of material. The issue was whether cl 20 of the sale and purchase agreement dated 26 September 2013 ('S&P') applied such that the delay could be excused and therefore no LAD.

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EOT NOS 1 AND 2 VIS A VIS CLL 15 AND 20

[4] EOT Nos 1 and 2 are similarly worded save for EOT No 1 being until November 2016 and EOT No 2 until March 2017. The letter dated 13 April I 2016 on EOT No 1 (*RR*/62) is as follows:

> ... with regards to the electrical infrastructure works, TNB has admitted and confirmed that TNB is NOT able to complete the electrical infrastructure works to the above units in February 2016 due to their administrative procedures and nationwide shortage of materials.

> Attached herewith the official reply letter by TNB dated 10th April 2016 ref: ... which is self-explanatory for your kind attention. TNB anticipated the works can only be completed by July 2016.
>
> With the above delay by TNB which is beyond the developer's control, other related infrastructure works and authorities inspections cannot be carried out and thus delaying the handing over of properties to the buyers. The estimated time period required after TNB cabling works to complete the other remaining infrastructure works and to arrange for authorities inspections will be another 4 months; thus, an extension of time up to end of November 2016 is required.

[5] The evidence of DW2 (Mr Tong Tee Wee, consulting engineer, Messrs Perunding Cekap) was that Perunding Cekap had been appointed by the defendant as the engineering consultant for the project of which the unit was a part of. DW2 was the consultant engineer. He issued EOT Nos 1 and 2. In Q&A 7 he explained the EOT was granted due to delay by TNB in the completion of the electrical infrastructure work mainly due to the administrative procedures and nationwide shortage of materials which was beyond the defendant's control. This was a decision based on meetings held on 6 April 2016 and August 2016 which he assigned to his employees Mr Richard Tan and En Norazam Ahmad to attend. It was during the meeting that TNB admitted and informed it was unable to complete the electrical infrastructure work due to their administrative procedures and nationwide shortage of materials. As to the meaning of the shortage of materials, DW2 explained thus:

> A12: The materials concerned are the cables, transformer and switchgear. These are essential to provide the electrical infrastructure works by TNB. There was shortage of the materials from TNB. TNB is the only supplier of these materials in the country. Hence, the delay that was occasioned was beyond the Defendant's control. That was the reason for the issuance of EOT.

[6] As to the effect of the EOT, he stated as follows:

> A13: The 1st EOT was granted for 4 months from July 2016 until November 2016 and the 2nd EOT was granted for 3 months from December 2016 until March 2017. Pursuant to the said EOT, the date for delivery of vacant possession was extended as allowed by the firm. The said EOT shall be final and binding upon the Plaintiff and Defendant.

(*RR*/114).

[7] He confirmed in re-examination the materials which suffered a shortage were important materials essential to complete the project and these were transformer, switch gear and cables (*RRT* 41).

[8] It must first be stated that under the S&P, cl 15.1 empowers the engineer/architect to allow EOT. This is evident from the aforesaid clause as follows:

15. DELIVERY OF VACANT POSSESSION

15.1 Subject to any extension or extensions of time as may be allowed by the said Engineer/Architect (which such extension(s) of time shall be informed in writing to the Purchaser) pursuant to Clause 20 hereinbelow ...

[9] DW2 had explained the reasons for the EOT. Although he was not present at the meeting of 6 April 2016 and August 2016 he had assigned his employees one of whom was En Norazman Ahmad who gave evidence as DW3 to attend and they briefed him on the outcome. DW3 confirmed that DW2 was the consulting engineer while he was the engineer and he further confirmed the reasons for the EOT and the materials being important for the project.

[10] The nett effect was the EOT Nos 1 and 2 had been allowed by a person stipulated under cl 15.1 which is the engineer, who was DW2.

[11] Clause 15.1 has to be read together with cl 20 which requires a force majeure event. The aforesaid cl 20 provides as follows:

20. FORCE MAJEURE

20.1 Notwithstanding anything to the contrary herein contained, the Vendor shall not be liable for any loss or damage to the Purchaser for any failure to fulfill any of the terms of this Agreement if in the opinion of the Vendor's architect such fulfillment is delayed, hindered or prevented by force majeure including but not limited to acts of God, strikes, lookouts, riots, civil commotion, general chaos, war exceptionally inclement weather, land slides/slips, earthquake, fire, flood or any other circumstances of whatsoever nature beyond the control of the vendor or by any reasons of the Purchaser requiring alterations or additions to the said Property.

20.2 The decision of the Said Engineer/Architect to any extension(s) of time allowed by the said Engineer/Architect pursuant to Clause 15.1 hereinabove due to such force majeure shall be final and binding upon the parties hereto.

[12] As seen by the evidence of DW2 and DW3 who were from the consulting engineering firm appointed for the project, the nationwide shortage of materials such as transformer, switch gear and cables had delayed the electrical infrastructure work done by TNB and was beyond the control of the defendant.

[13] This was also confirmed by DW4 (En Mohamd Salikon, TNB). He was the TNB Area Manager (Nusajaya) and one of his job scope was to supervise and monitor the supply of electricity for TNB projects in Johor Bahru. He was in charge of the defendant's project in terms of electricity supply. He confirmed issuing the letters dated 10 April 2016 (*RR*/63) and 17 August 2016 (*RR*/66) to Perunding Cekap that TNB was working towards completing the electricity supply to the project and estimated the time of completion to be July 2016 and subsequently to December 2016. The cause of the delay was administrative procedures and nationwide shortage of materials. Q&A 9 and 11 of his witness statement was as follows:

> S9: Sila terangkan dengan lebih lanjut berkenaan 'nationwide shortage of materials'.
>
> J9: 'Materials' di sini adalah merujuk kepada peralatan yang perlu dipasang untuk tujuan menyalurkan bekalan elektrik dengan sempurnya. Barang-barang utama adalah 'cables, transformer and switchgear' bagi tujuan pembekalan elektrik untuk projek tersebut. 'Materials' ini dibekalkan oleh pihak TNB sendiri bagi tujuan pembekalan elektrik. Disebabkan isu 'nationwide shortage of materials' pembekalan elektrik untuk projek tersebut tergendala. 'Materials' ini hanya boleh dibekalkan oleh pihak TNB sendiri bagi tujuan pembekalan elektrik untuk projek tersebut.
>
> ...
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> S11: Adakah TNB dapat menyiapkan pembekalan elektrik bagi projek tersebut seperti yang dijanjikan di dalam kedua-dua surat bertarikh di 10-4-2016 dan 17-8-2016 di atas?
>
> J11: Ya. Pihak TNB dapat menyempurnakan pembekalan elektrik untuk projek tersebut seperti di dalam EOT yang telah diberikan oleh Defendan kepada Plaintif. Isu 'shortage of materials' hanya dapat diselesaikan apabila 'materials' tersebut dibekalkan oleh pihak TNB bagi tujuan pembekalan elektrik untuk projek tersebut.

(*RR*/125 and 126).

[14] In cross-examination he stated he was not involved in the discussion leading to the issuance of the letter dated 10 April 2016. He agreed that the engineers of the project would be able to confirm the reason for the delay of the work. There was no letter from TNB to the defendant specifically to state the reason for delay was administrative procedures and nationwide shortage of materials (*RRT*/49–53).

[15] In re-examination on the engineers being able to explain the delay, he explained it was within his knowledge as the engineers would discuss and inform him. It was the responsibility of TNB to supply and execute the installation work. He was referred to a letter dated 8 April 2016 (*RR*/94) from

Perunding Cekap to TNB and confirmed that para 4.4 of the item 'JBU 0727 (32 units) *kerja-kerja penentangan kabel telah siap. Ketiadaan barang dalam pencawang iaitu switchgear and transformer*' meant shortage of materials. He further confirmed as long as there was a shortage, the electricity could not be supplied.

[16] The magistrate in her decision stated DW4 was not able to confirm the source of the delay as he had admitted only Nurhanni and Henabalan who were the engineers could do so. Although DW4 did say that, his evidence has to be looked in the context of him being the overall head and being briefed by the relevant officers.

[17] There was no official letters from TNB on the cause of delay. However these can be confirmed by the meeting attended by TNB and the defendant, one of whom was DW3, which led to the issuance of DW4's letters to the consulting engineering firm followed by the firm's letter to the defendant and the defendant's letter to the plaintiff (*RR*/61 and 64).

[18] The totality of the evidence of DW2, DW3 and DW4 was that there was a nationwide shortage of materials such as transformer, switch gear and cables; these materials were important for the project; the shortage had delayed the electrical infrastructure work done by TNB; and that it was beyond the control of the defendant.

[19] This was a force majeure event within cl 20, such that the EOT Nos 1 and 2 allowed pursuant to cl 15.1 is final and binding upon the parties as stipulated in cl 20.2. By virtue of the EOT, the defendant was not liable for LAD.

[20] In *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718; [2013] 3 CLJ 663 it was stated at pp 726–727 (MLJ); pp 673–674 (CLJ) that:

> (g) the court is of the view that in light of the certificate, it is deemed conclusive that the reasons for the delay in the completion and delivery of vacant possession of the unit are as stated in the certificate. The court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of, inter alia, fraud, misrepresentation or mala fides. It is trite that the court should not intervene to rewrite the terms and conditions of the sale and purchase agreement willingly accepted by the respondent when it entered into the agreement with the appellant;
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> ...
>
> (k) ... the court is of the view that in the present case the facts relied on by the architect are as contained in his report summary. It is because of the existence of the final and conclusive and binding clause that the court is constrained from

determining the reasons proferred by the architect in detail. Suffice to say that unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with mala fides, the certificate will have to be accepted.

[21] The certificate referred to was the extension of time. Hence too in this case the EOT granted is final and binding.

[22] The plaintiff had referred to *Araprop Development Sdn Bhd v Leong Chee Kong & Anor* [2008] 1 MLJ 783 where at p 805 it was stated:

> [30] Going through the evidence and as pleaded by the appellant itself, the delay was caused by laying the electrical and telephone cable late. I agree with the conclusion of the learned trial judge that the delay as pleaded is not a delay as stipulated by cl 22 of S&P. The delay in the present appeal was by the appellant's subcontractors who were under the control of the appellant. The S&P clearly provides for a completion date and I believe this is also true in the subcontracts with TNB and Maxis. The appellant could terminate the cob-contracts when it became obvious that the subcontractors could not complete the works within the stipulated time. As it was the appellant did nothing and now uses cl 22 of the S&P as an excuse for the delay.

[23] In *Araprop* the delay although caused by laying the electrical and telephone cable late was by sub contractors who were under the appellant's control. Thus the appellant could control their work. In this instance the delay to the electrical infrastructure work by TNB who was the third party supplier and was due to the nationwide shortage of materials which was clearly beyond the control of TNB, what more the defendant.

[24] The case of *Tang Kam Thai & Ors v Langkah Cergas Sdn Bhd & Ors* [2005] 7 MLJ 605 was also referred to at pp 609–610:

> ... Though admitting to such delay, the first defendant blamed it to circumstances beyond its control, inter alia, the management of the first defendant was under different people prior to their taking over; economic slow down; and changes made by the planning authorities; and that written requests for extension of time for delivery of vacant possession has been made to the Housing Ministry. But all these, in my opinion, do not exempt the first defendant from fulfilling its obligation to pay the residential properties purchasers the agreed liquidated damages as set out in the residential properties purchasers' agreements. The terms therein are explicit. When there is a delay in delivering vacant possession then liquidated damages have to be paid by the first defendant calculated after 36 months from date of agreements to the time when vacant possession is delivered.

[25] The reasons for the delay in *Tang Kam Thai* differ from this case when nationwide shortage of materials was beyond the control of the defendant and these materials had a direct impact on the work done by TNB.

[26] The plaintiff had submitted that Messrs Akipro Chartered Architect as the architect of the project ought to have given evidence. The court took the view there was no such need as the architect did not issue the EOT but the certificate of completion and compliance. This case dealt with the EOT allowed and the reasons therein.

NON-PAYMENT OF OTHER MONIES

[27] The defendant had also raised the defence that there could be no vacant possession where the plaintiff had not paid all installments of the purchase price and any other monies payable under the S&P.

[28] In the regard the plaintiff's sole witness PW1 (Mr Shankar a/l Selva Kumar, director) had confirmed the amount of RM24,259.98 as stated in the pleadings (*RR*/21) had not been paid, (*RR*/15–16). In re-examination he stated it had not been paid as according to the agreement these payments would be made after the keys had been collected and here it had not been collected (*RR*/22).

[29] DW1 (Pn Azizah Ismail, Deputy Manager Finance and Administrative) gave evidence that the documents in *RR*/75–79 were invoices to the plaintiff for payments which were outstanding. The outstanding items as in RR/21 were as follows:

Cukai Taksiran	: RM 5,028.50
Cukai Tanah	: RM 3,824.66
Yuran Perkhidmatan	: RM 7,632.00
Deposit Ubahsuai	: RM 2,000.00
Borang I	: RM 50.00
Deposit Bekalan Air	: RM 1,000.00
Caj Faedah	: RM 4,725.08
Bayaran Lebihan	: (RM 0.26)
	==========
Jumlah Tunggakan	: RM24,259.98
	==========

[30] With regard to the assessment and quit rent DW1 stated the defendant had paid to the local authority but there was no receipt. On the renovation fee DW1 confirmed the plaintiff had not done any renovation and it was up to the plaintiff to inform them in which case the amount would be deducted and the deposit was a requirement of the defendant. Form I was for change of name and the water deposit of RM1,000 had been advanced by the defendant. There were no receipts. On the late interest payment, the actual amount was RM12,357.92 which was reduced to RM4,725.08 upon the plaintiff's appeal.

No new invoice was issued for this. (All in *RRT*/24–28).

[31] In re-examination (*RRT*/31–32) on the assessment and quit rent, DW1 referred to the specific invoices at *RR*/81–84.

[32] Pursuant to cl 14.1 of the S&P, the plaintiff is required to pay to the defendant all outgoings including the quit rent and assessment commencing from the date of S&P until a separate document of title has been issued (cl 14.1.1) and the service fee and maintenance charges. Thus the amounts for assessment, quit rent, service fee and maintenance are due and payable to the defendant as reflected in the invoices. The same too for Form I and the deposit for water meter. The renovation fee is also payable being a requirement imposed by the defendant. For all these items, invoices were issued and can be seen in *RR*/75–84.

[33] On RM4,725.05 being the late payment interest, there was no invoice issued. In any event, the defendant has proved there were other monies payable which the plaintiff had not paid, even without taking into account the late payment interest.

[34] Therefore pursuant to cl 15.1 of the S&P there can be no vacant possession. The aforesaid clause states that '... PROVIDED ALWAYS that the Purchaser shall have paid to the Vendor all installments of the Purchase Price and any other monies payable under this Agreement as when and they become due ... the said Property shall be completed ... and ready for delivery of vacant possession ...'.

CONCLUSION

[35] For the above reasons, the defendant's appeal was allowed.

Appellant's appeal allowed.

Reported by Mohd Kamarul Anwar